IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GLENN DISTRIBUTORS CORP.	:	CIVIL ACTION
	:	
v.	:	
	:	
CARLISLE PLASTICS, INC.	:	NO. 98-2317

MEMORANDUM

Giles, C.J. September ___, 1999

Glenn Distributors Corp. ("Glenn") brings this diversity action against Carlisle Plastics, Inc. ("Carlisle"), seeking damages for an alleged breach of a contract for the sale of approximately $1 million in goods. Before the court are Glenn's Motion for Partial Summary Judgment as to Liability and Carlisle's Motion for Summary Judgment. For the reasons that follow, Glenn's motion is denied, Carlisle's motion is granted, and judgment is entered in favor of Carlisle and against Glenn.

Factual Background

Glenn is in the business of reselling close-out items, primarily plastic trash and storage bags. Carlisle is in the business of selling various plastic items, including trash bags and food storage bags, to companies for resale. Carlisle sells both to retail customers and to close-out customers such as Glenn. According to industry usage, close-out goods are items originally intended for sale to a retail purchaser but which were not sold to a retailer and remain available for sale. The parties have a business relationship dating back at least to 1995.

The facts surrounding this particular business transaction are not in dispute. On or about June 5, 1997, Carlisle sent to Glenn a single-page listing of "Obsolete Finished Goods and Packaging" and a 5-page listing of "Close-out Product" for possible sale to Glenn. The listings

specified that the quantities listed represented the inventory available on the date of 6/5/97; the listing of obsolete goods explicitly stated "As of 6/5/97." At the bottom of each page it stated "Quantities Subject to Change" or "All Quantities Subject to Change." Testimony from Sandy Johnson ("Johnson") of Carlisle reinforces that the quantities listed represented inventory for one particular day. On June 12, 1997, Glenn faxed to Carlisle Purchase Order No. 10354, requesting various items from the faxed lists in amounts totaling just under $1 million. The purchase order specified, "Quantities are per faxed list from Carlisle on June 5, 1997."

On June 13, 1997, Johnson sent a memorandum to Glenn Segal ("Segal"), president of Glenn, confirming the number of cases or units requested and the total price of approximately $990,000. The memorandum stated, "I had to enter the orders with a per case price so that if the quantities change we have a way to bill you for only what you have received." The memorandum also included an offer of two additional items, which Segal accepted on behalf of Glenn by handwriting an acceptance on the memorandum and faxing it back to Johnson. This brought the total goods ordered to just below $1 million. Glenn concedes that the quantity provisions governing the original purchase order also would govern the purchase of these additional items.

On or about June 12, 1997, Glenn sent to Carlisle a check, dated June 12, 1997, for $100,000, the first of eight payments totaling $750,000 (seven payments of $100,000 and one payment of $50,000) made to Carlisle between June and September 1997. Glenn never paid an additional $250,000 to Carlisle. Carlisle began shipping goods within a few days, as reflected in invoices dated June 13, 1997. Numerous invoices from June, July, and August 1997 reflect a steady stream of merchandise shipping from Carlisle to Glenn. Ultimately, Glenn received

approximately $736,365 worth of goods, based on the shipping invoices produced of record.[1] However, the remaining allegedly requested goods, valued at approximately $264,000, never were shipped to Glenn. Carlisle has admitted that some of those goods were sold to other customers. Johnson testified at her deposition that if a retail customer orders a particular product before it has shipped as part of a close-out order, the "subject to change" language gives Carlisle some flexibility. (Johnson Dep., at 64). A reasonable inference from this testimony is that Carlisle's business practice was to give retail customers priority over close-out customers and to make particular items available to retail customers before they were available as part of close-out shipments.

This action followed in May 1998. Glenn sought damages for state law claims for breach of contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, and constructive trust. By Order dated April 19, 1999, this court granted summary judgment as to all but the breach of contract claims. The parties filed the cross-motions for summary judgment to dispose of this final claim.

Discussion

This court has subject matter jurisdiction over this matter on the basis of diversity of citizenship, pursuant to 28 U.S.C. § 1332(a)(1). Venue is properly laid in this court pursuant to 28 U.S.C. § 1391(a)(2), in that the delivery of goods pursuant to the contract was to have been made within this judicial district. This court, sitting in diversity, is bound to apply state law, see

[1]Carlisle argues in its brief that the value of goods shipped was higher than that figure and actually closer to the $750,000 that Glenn actually paid. However, Carlisle provides no evidentiary support for this position. Moreover, in a letter to Glenn's attorney dated May 13, 1998, Scott Chase, Carlisle's Director of Credit and Collections, "freely admitted" that $14,000 was on Glenn's account as a credit and could be returned to Glenn.

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938), and it is undisputed that Pennsylvania law governs this action.

Summary Judgment Standard

Summary judgment pursuant to Fed. R. Civ. P. 56(c) is especially appropriate where, as here, this court is asked to construe contractual clauses that are clear and unambiguous and the only disputed point is the legal consequences that flow from those provisions. Wagman v. Carmel, 601 F. Supp. 1012, 1014 (E.D. Pa. 1985) (Katz, J.). Where the facts of a contract are not in dispute and the terms of the contract are unambiguous, determining the meaning and legal effect of the contract is purely a question of law that is an appropriate matter for this court to resolve on summary judgment. See Tamarind Resort Assocs. v. Gov't of the Virgin Islands, 138 F.3d 107, 110 (3d Cir. 1998) (citations omitted); Skinner v. Ryan and Christie Transit Corp., Civ. No. 89-6561, 1990 WL 76528, *1 (E.D. Pa. 1990) (Kelly, J.M., J.); Buford v. Wilmington Trust Co., 656 F. Supp. 869, 871 (E.D. Pa. 1987) (Newcomer, J.). Where, as here, the parties have filed cross-motions, the court considers the competing motions separately, see Williams v. Philadelphia Hous. Auth., 834 F. Supp. 794, 797 (E.D. Pa. 1993) (Joyner, J.), aff'd mem., 27 F.3d 560 (3d Cir. 1994), and will grant judgment as a matter of law in favor of one of the parties based on the resolution of the legal question of the proper construction and interpretation of the contract.

Existence of a Contract

As an initial matter, Carlisle argues that no valid, enforceable contract exists between the parties because the documents comprising their agreement do not specify a quantity term. The court rejects this argument.

The Pennsylvania Statute of Frauds requires that a contract for the sale of goods for the price of $500 or more must be evidenced by a writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought. 13 Pa. C.S. § 2201(a). Such a sufficient writing is evidence of a contract but does not prove the existence or terms of a contract. Eastern Dental Corp. v. Isaac Masel Co., Inc., 502 F. Supp. 1354, 1363 (E.D. Pa. 1980) (Luongo, J.). Several writings may be used to satisfy the statute of frauds if they bear either express reference to one another or internal evidence of their interrelation. Conaway v. 20th Century Corp., 420 A.2d 405, 411 (Pa. 1980). To satisfy the statute, such a writing must meet three requirements: 1) it must be signed by the party to be charged; 2) it must evidence a contract for the sale of goods; and 3) it must specify a quantity term. Eastern Dental, 502 F. Supp. at 1363; 13 Pa. C.S. § 2201 cmt. 1. In this case, the list, Purchase Order 10354, and the copies of the June 13 memorandum together may constitute a sufficient writing if they meet the three requisites of § 2201(a). According to Carlisle, because the writings provide that the quantities were subject to change, there was no specific quantity term and the contract therefore is unenforceable in its entirety.

However, the four documents all reference specific quantities of specific goods available as of June 5, 1997 that Carlisle offered for sale in the faxed list and that Glenn accepted by stating in the purchase order that "quantities are per faxed list from Carlisle on June 5, 1997." Those quantities necessarily were subject to change due to the nature of obsolete or close-out items, which are available for sale only as long as decreasing supplies remain after any sales to retail customers. Moreover, the "subject to change" language served Carlisle's business practice of giving priority to retail customers. According to Johnson's deposition testimony, the

quantities listed represented inventory for a given day and the "subject to change" clause gave Carlisle the flexibility to sell some unshipped items to retail customers while still maintaining a contract to ship any remaining quantities to close-out customers.

It does not follow, however, that this provision renders the quantity term insufficiently specific for Statute of Frauds purposes. If it did, an enforceable contract for the sale of obsolete or close-out items never could exist since quantities always would be subject to change pursuant to Carlisle's business practices; even Carlisle does not suggest this to be the case. Thus, there was a specific quantity term in the writings, the requirements of § 2201(a) were met, and a valid, enforceable contract did exist.

Interpretation of the Contract

Having determined that a contract did exist between the parties, the court turns to the issue of the meaning, interpretation, and legal consequences of that contract. This is a question for the court in the first instance. Buford, 656 F. Supp. at 871. Both parties agree that the language contained in the contract documents is "clear and unambiguous." This court concurs because the relevant language of the contract is reasonably capable only of one construction and only can reasonably be understood in one sense. See Tamarind Assoc., 138 F.3d at 110-11; Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 614 (3d Cir. 1995) (quoting Samuel Rappaport Family Partnership v. Meridian Bank, 657 A.2d 17, 21 (Pa. Super. 1995), quoting in turn Krizovensky v. Krizovensky, 624 A.2d 638, 642 (Pa. Super. 1993)) (stating that a "contract will be found ambiguous 'if, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one"). Where the language of a contract is clear and unambiguous, as it is here, it is axiomatic that it "must be

given its plain meaning." Tamarind Assocs., 138 F.3d at 110 (citation omitted).

The parties disagree only about which of the unambiguous provisions controls. Carlisle focuses on the "subject to change" language in the contract documents, arguing that the clause means that there was no breach of contract resulting from its shipment of only $736,000 rather than $1 million of goods. Glenn ignores that language, arguing instead that it had ordered specific quantities of specific goods at a value of nearly $1 million that should have shipped within 90 days and that the failure to ship the remaining quantities constituted a breach of contract.

This court agrees with Carlisle that the "subject to change" clause means that its failure to ship the remaining goods to Glenn and the sale of some of those goods to other customers did not breach the contract. That clause appeared on the face of the original lists of items faxed by Carlisle and Glenn explicitly incorporated that provision into Purchase Order No. 10354 by stating, "Quantities are per faxed list." This reference to and incorporation of the faxed list necessarily includes the "subject to change" provision contained therein. There was indeed a contract in this case and the contract means what it says: the quantities available for delivery were subject to change prior to shipping.

That language, given its plain meaning as this court must, is reasonably susceptible of only one construction and reasonably can be understood only in one sense: The available quantities of goods could change, at any time and for any reason whatsoever, between the time of the purchase order and the time of shipping. Carlisle could ship lesser quantities of goods than requested, depending on availability, without breaching the contract. A further inference from that language is that Carlisle could following its ordinary business practices and sell items to

priority retail customers instead of a close-out customer such as Glenn, as it admittedly did here, without breaching the contract.

Although the clear and unambiguous contractual language firmly and conclusively resolves the issue, this court's legal conclusion is bolstered by examining evidence of the parties' course of dealing. Under Pennsylvania's version of the Uniform Commercial Code, course of dealing is a "sequence of previous conduct between the parties . . . which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." 13 Pa. C.S. § 1205(a). Course of dealing evidence cannot contradict the plain language of express terms of an agreement, but it may explain, supplement, and give meaning to the particular terms of an agreement. See 13 Pa. C.S. § 2202(1) ("Terms . . . may be explained or supplemented . . . by course of dealing"); 13 Pa. C.S. § 1205(c) ("A course of dealing . . . give[s] particular meaning to and supplement[s] or qualif[ies] terms of an agreement.").

Carlisle submits summaries of prior transactions between it and Glenn, showing that in numerous previous transactions dating back to 1995, Carlisle shipped less than the quantity that Glenn had ordered, in some cases substantially less than what Glenn had ordered.[2] No legal

[2]Glenn argues that the summaries should be disregarded because Carlisle has not satisfied the admissibility requirements of Fed. R. Evid. 1006. That rule provides that a summary of voluminous writings may be presented as evidence, provided the underlying documents that have been summarized are made available for examination and copying. First, Carlisle did notify Glenn of the opportunity to view or copy from microfiche the documents underlying the transaction summaries, in a letter to Glenn's counsel dated November 5, 1998. Second, evidence submitted on summary judgment need not be in admissible form, but must be "redic[ible] to admissible evidence." Williams v. Borough of West Chester, 891 F.2d 458, 466 n.12 (3d Cir. 1989) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)). Evidence not yet in admissible form may be considered on summary judgment if the party offering the evidence could show that the evidence may be presented in admissible form for trial. Williams, 891 F.2d at 466 n.12. The letter from counsel for Carlisle to counsel for Glenn satisfies this court that the materials underlying the transaction summary will be available for Glenn's examination and

dispute followed from these prior shipments, nor did Glenn cease doing business with Carlisle in response to these smaller shipments. This evidence reasonably shows that the parties understood that quantities were subject to change and that Carlisle might ship less than the quantities it offered in the initial list or than Glenn requested in the purchase order. This course of prior dealing in no way contradicts the plain language of the documents, but rather provides additional explanation and support for this court's interpretation of the "subject to change" language and the conclusion that Carlisle's failure to ship the remaining $264,000 of goods to Glenn did not constitute a breach of the contract.

Remaining Credit on Account

The record before this court shows that Glenn paid $750,000 to Carlisle and received approximately $736,365 worth of goods. Carlisle thus holds approximately $14,000 of Glenn's money, which Carlisle obviously cannot keep. Carlisle acknowledged in a letter to Glenn's counsel, dated May 13, 1998, that it held this amount on Glenn's account. That money should be a credit towards future purchases, if Glenn chooses to do business with Carlisle in the future. If not, Carlisle should return that money to Glenn with appropriate interest.

An appropriate order follows.

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copying and might be available for production in court if this court so orders. This is sufficient for present purposes.

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JUDGMENT

AND NOW, this ___ day of September 1999, upon consideration of Plaintiff's Motion for Partial Summary Judgment as to Liability and Defendant's Motion for Summary Judgment, and the arguments of the parties, for the reasons stated in the attached memorandum, it hereby is ORDERED that Plaintiff's motion is DENIED and Defendant's motion is GRANTED. JUDGMENT hereby is entered IN FAVOR of Defendant and AGAINST Plaintiff.

Further, it hereby is ORDERED that all other motions are DENIED AS MOOT. Further, it hereby is ORDERED that the amount of $14,000 paid by Plaintiff to Defendant for which no goods have been shipped shall, at Plaintiff's choice, serve as a credit on Plaintiff's account or shall be returned to Plaintiff,

with appropriate interest from June 12, 1997 until the date of payment.

BY THE COURT:

_____
JAMES T. GILES C.J.

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to